

The Hungarian Constitutional Court and the Financial Crisis

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Abstract. The article joins the scholarly discussion regarding how the financial crisis affects constitutional adjudication. It is argued that constitutional adjudication is changing in Hungary partly with regard to the financial crisis, because references to the financial crisis are a strong element of the argumentation e.g. in foreign currency loan related cases, but also in the justification of general constitutional changes, in the adoption of certain provisions of the Fundamental Law. The assessment suggests that the instability of constitutional adjudication is also interrelated with the general constitutional crisis in Hungary since 2010. Both factors of the financial crisis and of the constitutional crisis have led to the alteration of former rule of law standards in Hungary also in cases related to the financial crisis, but otherwise as well. The paper composes of two parts, the first explains the deepest financial and constitutional crisis. In the second part, we summarize the jurisprudence of the Constitutional Court in foreign currency loan related cases and evaluate the argument of financial crisis in these cases compared to others.

Keywords: constitutional adjudication in financial crisis, Hungarian Constitutional Court, constitutional crisis

1. INTRODUCTION

The credit crunch of 2008 and the following global financial and economic crisis was a strain on the national constitutional systems, and posed new challenges. Necessarily, national responses were taken: saving and austerity measures, corrective packages, government measures affecting investors and the banking system etc. This crisis legislation, normally, still has to remain within the framework of the constitution. In some cases – such as in Hungary – the economic crisis emerged together with a constitutional crisis.¹ The rule of law became a ‘public enemy’ in the eye of the government, and its guardian, the Constitutional Court was restricted.² The 2011 Fundamental Law entering into force on the 1 January 2012³ swept away the 1989 Constitution during the economic crisis.⁴ The Hungarian Fundamental Law is a crisis-constitution in a sense that it contains some – seemingly transitory – rules on debt control and stipulates strict fiscal requirements.⁵

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¹ Bánkuti, Halmai and Scheppele (2012) 237–68.

² Chronowski (2014) 68–83.

³ The official English translation of the Fundamental Law (consolidated version after the Fifth Amendment) is available at <<http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>> accessed 31 July 2017.

⁴ Contiades and Fotiadou (2013) 50.

⁵ This idea was expressed by Barnabás Lenkovic in his dissenting opinion to CC Decision 45/2012. (XII. 29.) AB (ABH 2012, 432–433.):

[234] However it shall be established as a fact that in the twenty-year-long process of the so called transition [...] the country has been fallen into severe, extended and deep (political, economic, financial, social, moral etc.) crisis. This crisis was brought forth partly by inner circumstances stemming from the Hungarian rule of law governed state, partly by external ones (global and European

Paradoxically, the Constitutional Court is prevented from enforcing the debt reduction provisions of the Fundamental Law, which are most likely to be affected by legislative measures of fiscal nature.⁶ The paper explains how the institutional capacity of the Constitutional Court was eroded in the times of financial crisis in Hungary.

2. THE FINANCIAL CRISIS

Before the change of the regime in 1989-90, the size of consumer loans in Hungary was negligible.⁷ Although the market started to evolve in the 90s, it was only at the end of the decade when the consumer loan market started to expand significantly. In June 2000, household debts did not reach 600 billion HUF, four years later, this amount reached 3500 billion HUF. The sudden growth was due to various measures aiming at subsidising the purchase of new dwellings were introduced by the government. Economists quickly started raising concerns about such growth.⁸ The Hungarian National Bank stated in 2004 that a decrease in the real wage growth may lead to that fact that the debtors will be unable to perform that payment obligations arising from the loan agreements, and consequently it could lead to a decline in consumer demand.⁹ The National Bank further warned that ‘Credit risk, the most important risk segment of consumer lending, is affected by the fact that some debtors are unable to accurately assess the reasonable limits of their financial capabilities regarding principal repayment, which can be partly attributed to deficiencies in the domestic financial culture.’¹⁰

Parallel to risk relating to over indebtedness in general, a further specific risk also emerged in Hungary. Whereas until mid-1999 consumer loans as a percent of GDP did not reach 0,1 percent, by 2003 it was over 2 percent, and in mid-2004 it exceeded 3,7 percent.¹¹ The reason for this was that the interest rate in Hungary was significantly higher than the interest rate in the EU or in Switzerland. Between 2004–2006 when the CHF interest rate was below 1 percent and the EUR interest rate was around 2 percent, the HUF interest rate varied between 11–12 percent, which slightly decreased later.¹² By foreign currency loans made it possible for even those consumers to take out loans, who would not have received such loans in HUF due to their financial situation (low income, lack of savings etc.). The

Union). The national, European and global crisis management has taken new directions. [...] In this atmosphere, under these circumstances took the Hungarian constitution-making place in 2010, and was adopted the new Fundamental Law of Hungary in 2011. Under the same circumstances is the reformulation of the constitutional system taking place even today, and in this process we can observe new and unusual solutions. (Authors’ translation.)

⁶ As Zoltán Szente assesses, ‘the elimination of constitutional review of the public finance legislation [...] creates the impression that the constitutional constraints of the executive power can be put aside in economically difficult times’. Szente (2015) 195.

⁷ Bethlendi and Nagyné Vas (2004).

⁸ E.g. <http://www.bankszovetseg.hu/wp-content/uploads/2012/10/51Dobak_Sagi.pdf> accessed 31 July 2017.

⁹ <<http://www.mnb.hu/letoltes/stab-jel-20041206-hu.pdf>> (available in English at <<http://epa.oszk.hu/00300/00378/00010/pdf/00010.pdf>>) accessed 31 July 2017.

¹⁰ <<http://www.mnb.hu/letoltes/stab-jel-20041206-hu.pdf>> 12. accessed 31 July 2017.

¹¹ See Chart IV-7 of the Financial Stability Report 2004.

¹² Data from the websites of the Hungarian National Bank. For further reasons of foreign-currency loans see Hudecz (2012) 349–411. (An abridged English version was published in Hudecz (2015) 257–286. See also: Kolozsi, Banai and Vonnák (2015) 60–87.

Hungarian National Bank raised concerns about this trend already in 2001 and more: ‘The robust expansion of foreign currency lending reflects households’ low risk awareness and/or risk sensitivity. The high interest rate differential reflects the risks arising from exchange rate uncertainty; and households are not willing to pay the price of this risk premium.’¹³

Before the 2008-crisis neither the Parliament, nor the authorities intervened. However, this attitude significantly changed with the crisis.¹⁴ Just to give a few examples: in October 2009 the Government issued a decree [361/209. (XII. 30.) gov. decree] on prudent retail lending and the examination of creditworthiness. In 2010 the Parliament adopted a ban with the Act XCVI on mortgage backed loans which are not denominated in HUF. These steps contributed to the decrease of CHF and EUR denominated loans. However, further steps seemed to be inevitable in order to help debtors who are unable to repay their loans.

By taking out loans which were not denominated in HUF, the Hungarian debtors, who received their income in HUF, undertook the exchange rate risk. The CHF/HUF exchange rate in 2005 was around 160–165, and the EUR/HUF around 250. In 2009 the CHF/HUF rate moved between 180–200 and the EUR/HUF around 270–310. This led to the fact that the instalment of the debtors calculated in HUF extremely increased. This clearly reflected in the ratio of non-performing loans. By the end of 2014 one in four mortgage loan qualified as non-performing loan, meaning that the debtor failed to perform its payment obligation for more than 90 days. To put it in perspective, the amount of non-performing loans equals to 5% of Hungary’s GDP.¹⁵

The Parliament introduced the possibility of prepayment of the loans at a preferential exchange rate in 2011, and made the freezing the monthly payments possible for a certain period. Furthermore, two acts were adopted, which significantly re-shaped the loan market. These laws on fair banking were adopted which intend to give further protection to the consumer by increasing transparency of loans and diminish the harm of the crises. These pieces of legislation ended up to be judged by the Constitutional Court of Hungary, we will discuss them in part 3.2.

3. CONSTITUTIONAL CRISIS

Meanwhile this situation of financial crisis caused an ongoing challenge not only in Hungary but all over Europe. In Hungary parliamentary elections took place in 2010 and the two-thirds majority of the Parliament adopted a new constitution called Fundamental Law (FL) in April 2011. Article B) of the FL – at least on the surface – asserts the most important principles of the former Constitution – these are the rule of law and democracy – and, although not in the official name of the country, but at least regarding the form of State, Hungary remained a republic.¹⁶ Furthermore, Article C) (1) of the FL explicitly provides the principle of division of powers and the FL orders to protect fundamental rights as well. Against this background, however, we must report about a constitutional crisis after the financial one.¹⁷

¹³ <<http://www.mnb.hu/letoltes/stab-jel-20041206-hu.pdf>> p. 115. accessed 31 July 2017.

¹⁴ Deák (2014) 151–84.

¹⁵ <<https://www.mnb.hu/letoltes/mnb-tanulmanyok-kulonszam-a-nemteljesito-lakossagi-jelzaloghitel-portfolio-atfogo-elemzese.pdf>> accessed 31 July 2017.

¹⁶ Article B(1)-(2) of the FL.

¹⁷ Chronowski and Varju (2017); Chronowski and Varju (2016) 271–89; Chronowski and Varju (2015) 296–310.

3.1 Instability of the fundamental law and the constitutional architecture

Regarding the mechanism for safeguarding the constitution, one of the weaknesses is that the FL – similarly to the former Constitution – can be amended relatively easily, only the two-thirds majority of all MPs is needed. The constitution amending process that started in 2010 and led to the constant amendments of the former Constitution based on *ad hoc* political interests, made it clear that more guarantees are necessary – e.g. unamendable provisions, referendum on certain amendments, approval of two sequential parliaments – for a stable constitution. But nothing has happened and the overwhelming practice of amending the constitution was going on with the FL, from 2012 as well, because the governing two-thirds majority re-elected in 2014 has adopted modifications over and over again. Between 2010 and 2013, the amendments were voted for partly with the purpose of punishing the Constitutional Court for unfavourable decisions, overruling the Court's judgements or to prevent constitutional review.¹⁸

The Parliament has modified the FL up until 2017 six times,¹⁹ and has, *inter alia*, cemented the model of limited constitutional judicial review, attempted to break constitutional continuity, to restrict the exercise of the right to vote and freedom of expression and perpetuated the practice of overruling the Constitutional Court's decisions. The Constitutional Court has tried, sometimes with greater, sometimes with less determination, to protect the original FL based strongly on the former rule of law Constitution, with a varying degree of success. European bodies have followed this process with great interest: the Venice Commission of the Council of Europe kept on providing its opinions on the significant amendments to the FL and on the cardinal laws and the European Parliament adopted several resolutions as well.²⁰ The sharpest criticism was triggered by the Fourth Amendment to the FL in 2013, with which *lex specialis* rules were introduced contrary to the fundamental principles of the rule of law, democracy and the protection of fundamental rights. Furthermore, regulations (e.g. student contracts, acknowledgement of churches, concept of family) evading or bypassing Constitutional Court rulings were enacted, substantially reducing the space for constitutional protection. A specific review, and a new interpretation limit were raised in the way of constitutional judicial review (excluding substantial review of the amendments to the FL in Article S) para. 3; repealing Constitutional Court decisions adopted before the FL in Closing Provisions point 5). An open infringement of EU law (limitation of election campaigns, possibility of special taxation as an indirect result of court rulings²¹) was also risked.

¹⁸ Chronowski (2015) 223–40.

¹⁹ The Sixth Amendment entered into force on 1 July 2016, and it introduced a new state of exigency in case of threat of or act of terrorism – beyond the existing five exigency situation, i.e. national crisis, emergency, preventive defence, unexpected attack, and danger. See Uitz (2016). After the unsuccessful refugee relocation referendum (2 October 2016), the prime minister put the seventh amendment on the agenda in October 2016 so as to exclude in the constitution any relocation of applicants for international protection to the territory of Hungary upon EU decision, however, this proposed amendment failed.

²⁰ E.g. European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)).

²¹ As the European Commission expressed its serious concerns about the conformity with EU law of the new provision on CJEU judgements entailing payment obligations, the Fifth Amendment repealed this rule.

The European Commission initiated several infringement procedures against Hungary as well, on the basis of which the Court of Justice of the European Union (hereinafter: CJEU) issued important judgements with direct constitutional implications. One on the subject of radical lowering of the retirement age of judges and another on the subject of bringing to an end the term served by the Data Protection Supervisor. According to the decision of the CJEU Hungary had infringed EU law in both cases.²²

The European Court of Human Rights also received Hungarian cases which had arisen from the elimination of the constitutionalism and from the arrangements based on the FL. These include the new, restrictive rules on the recognition of churches, the possibility for dismissal from public employment without reasoning, the availability of lifetime imprisonment without compulsory review, the premature termination of the mandate of the President of the Supreme Court, and the ban of the parliamentary right of expression.²³ Hungary had infringed the European Convention on Human Rights in every above mentioned case.

There is no room here to provide a comprehensive analysis of all of the constitutional issues arisen and debated at European fora.²⁴ However, expeditiously we can diagnose that the developments of the last seven years question the commitment to the common European constitutional values such as rule of law, democracy and individual freedoms.

3.2 Constitutional review and the capacity of the constitutional court

In Hungary, the key institution in safeguarding the constitution and constitutionality is the Constitutional Court. In parliamentary governmental systems, if the government is supported by a wide parliamentary majority, constitutional adjudication counterbalancing the unity of action of parliament and government constitutes the guarantee for the separation of powers and the sovereignty of the law (constitution). The greater the unity of action between the parliament and government, the wider competence is needed for constitutional adjudication to maintain the balance. In respect of the principle of rule of law it is very harmful that the FL upholds for an indefinite time the restriction of the supervision and annulment rights of the Constitutional Court that was introduced in November 2010.²⁵ More specifically, Article 37(4) of the Chapter on Public Finances of the FL lays down that with regard to *ex post* norm control and constitutional complaint procedures, the Constitutional

²² *Case C-286/12, Commission v Hungary*, judgement of 6 November 2012; *Case C-286/12, Commission v Hungary*, judgement of 8 April 2014.

²³ *Magyar Keresztény Mennonita Egyház and others v. Hungary*, Judgement of 8 April 2014; *K.M.C. v. Hungary*, Judgement of 10 July 2012; *László Magyar v. Hungary*, Judgement of 20 May 2014, no. 73593/10; *Baka v. Hungary*, Judgement of 27 May 2014, no. 20261/12., *Karácsony and others v. Hungary*, Judgement of 16 September 2014, no. 42461/13.

²⁴ See for example Vörös (2014); Zeller (2013) 307–25; Vincze (2013).

²⁵ As a result of a constitutional amendment in November 2010, a serious limitation of the competences of the Constitutional Court was introduced in to the ‘old’ Constitution article 32/A. According to this amendment, the Constitutional Court may assess the constitutionality of Acts related to the state budget, central taxes, duties and contributions, custom duties and central conditions for local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to the Hungarian citizenship. Also, the Court may only annul these Acts in case of violation of the abovementioned rights. The restriction of the Constitutional Court’s competences was the answer of the alliance of the governing parties to a Court decision, which annulled a law on a certain tax imposed with retroactive effect.

Court is prevented from reviewing the content of or annulling acts on public finances, with the exception of four ‘protected fundamental rights’, as long as state debt exceeds half of the Gross Domestic Product.²⁶ Thus, the power of annulment is curtailed by Article 37(4) of the FL, because it excludes the constitutional review of Acts relating to public finances. This is not rectified even by the fact that Acts relating to this subject-matter may be annulled in case the requirements of the legislative process were not met (for formal reasons). Paradoxically, this way the Fundamental Law also excludes the protection by the Constitutional Court of its own provisions relating to public finances, because the violation of rules relating to public finances contained in the Fundamental Law is most likely to occur by way of Acts relating to the state budget, taxes, customs duties etc., which are subject to *ex post* review by the Constitutional Court only from the aspect of the four protected fields of fundamental rights. The Transitory Provisions to the Fundamental Law (TP-FL), adopted in December 2011 and having the same rank (legal status) in the hierarchy of norms as the FL, upheld and extended the effect of the disputed limitation on constitutional review,²⁷ and the Fourth Amendment incorporated it into the text of the FL itself.²⁸

The restriction of the Constitutional Court’s powers of review and annulment is not in conformity either with the principles of European constitutional achievements or the traditions of Hungarian constitutionalism and democratic political culture developed since the democratic transition of 1989-90. It violates the constitutional principles of the rule of law, legal security and separation of powers. As a result of the restriction of the powers of the Constitutional Court, numerous fundamental rights (especially, for example, the right to property, social rights, the freedom to conduct a business the right to a profession) become ‘defenseless’.²⁹

The TP-FL introduced further indirect constraints, since then annulled, on the right to effective judicial protection. If the ruling of the Constitutional Court or the CJEU results in a debt obligation of the State, under certain circumstances a general contribution covering the common needs – i.e. special industry levies – shall be adopted. It can be understood as an intention to sanction – at least indirectly – the lawsuits and complaints in cases of great

²⁶ FL Art. 37(4):

As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24(2)b-e), only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship. The Constitutional Court shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law’s procedural requirements for the drafting and publication of such legislation.

²⁷ Article 27 of the TP-FL: ‘Article 37(4) of the Fundamental Law shall remain in force for Acts that were promulgated when the state debt to the Gross Domestic Product ratio exceeded 50% even if the ration no longer exceeds 50%.’ This Article was annulled by the Constitutional Court in its Decision 45/2012. (XII. 29.) AB.

²⁸ See Article 17 of the Fourth Amendment and Article 37(5) of the FL: ‘In the case of provisions of Acts that entered into force in a period while the state debt exceeded half of the Gross Domestic Product, Paragraph (4) shall apply to such period even if state debt no longer exceeds half of the Gross Domestic Product.’

²⁹ See also Opinion no. 621/2011 of the Venice Commission, points 91–101, 120–27.

economic significance.³⁰ The Constitutional Court annulled this provision however, the Fourth Amendment of the FL incorporated it into the text of the Constitution. Since the European Commission expressed its serious concerns about the conformity with EU law of the new article on CJEU judgements entailing payment obligations,³¹ the Fifth Amendment³² repealed this rule.

In addition, it was an extremely alarming issue concerning the basic principles of the FL that the TP-FL has constructed an unusual constitutional liability for the ‘communist past’. Furthermore it has overruled some important rulings of the Constitutional Court e.g. on the right to the lawful and impartial judge³³ and undermined some rules of the FL itself.³⁴ According to the Commissioner for Fundamental Rights of Hungary (Ombudsman), the TP-FL severely harmed the principle of the rule of law, which may cause problems of interpretation and may endanger the unity and operation of the legal system. The Ombudsman became concerned as well because the TP-FL contained many rules obviously having had no transitional character. Finally the Ombudsman requested the Constitutional Court to examine whether the Transitional Provisions comply with the requirements of the rule of law laid down in the FL (Article B). After the Ombudsman’s initiative, the Parliament adopted the First Amendment to the FL clarifying that the Transitional Provisions are part of the FL. By this amendment the governing majority intended to avoid the constitutional review.³⁵ Despite this, the Constitutional Court ruled on the Ombudsman’s petition declaring that all the provisions of the TP-FL lacking transitory character are invalid.³⁶

³⁰ See Article 29 of TP-FL:

As long as the public debt exceeds 50% of the GDP, if the Constitutional Court, the CJEU, other Court or other law applying that body’s decision requires the State to pay a fine, and the Act on the central budget does not contain necessary reserves to pay the fine, and the amount of the fine cannot be allocated from the budget without undermining a balanced management of the budget or no other item from the budget may be eliminated to provide for the fine, a general contribution covering the common needs must be specified that relates in its name and content exclusively and explicitly to the above fine.

This Article was annulled by the Constitutional Court in its Decision 45/2012. (XII. 29.) AB.

³¹ http://europa.eu/rapid/press-release_IP-13-327_en.htm.

³² The Fifth Amendment of the FL was adopted by the governing majority in September 2013 with the intention of ‘closing international debates’, however not all of the challenged articles were modified. It entered into force on 1 October 2013.

³³ CC Decision 166/2011. (XII. 20.) AB.

³⁴ On the TP-FL and other cardinal acts read more in Halmai and Scheppele (2012).

³⁵ In April 2012 the Government of Hungary submitted a bill to the Parliament as the First Amendment of the Fundamental Law of Hungary so as to clarify that the Transitional Provisions are the part of the FL. It is available in Hungarian at <<http://www.parlament.hu/irom39/06817/06817.pdf>> (accessed 30 November 2016). The first amendment was adopted in June 2012. It added a new 5th point to the Closing Provisions of the FL: ‘5. The transitional provisions related to this Fundamental Law adopted according to point 3 (31 December 2011) are part of the Fundamental Law.’ Other relevant points of the Closing provisions: ‘2. Parliament shall adopt this Fundamental Law according to point a) of subsection (3) of Section 19 and subsection (3) of Section 24 of Act XX of 1949. 3. The transitional provisions related to this Fundamental Act shall be adopted separately by Parliament according to the procedure referred to in point 2 above.’ (The FL was not in force yet when the Parliament adopted the Transitional Provisions – that is the reason of the reference to the former Constitution).

³⁶ The Constitutional Court annulled approximately half of the articles of the TP-FL in its decision of 28 December 2012 [CC Decision 45/2012. (XII. 29.) AB]. Press release: ‘The

The Constitutional Court announced in its Decision No. 45/2012. (XII. 29.) AB that Constitutional legality has not only procedural, formal and public law validity requirements, but also substantial ones. The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by the community of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. If appropriate, the Constitutional Court may even examine if the substantive guarantees of the rule of law, the values of democratic States under the rule of law are observed.³⁷

As a response, the governing majority adopted the Fourth Amendment of the FL in 2013, which incorporated into the Constitution most of the abolished articles, and overrode several former Constitutional Court decisions. The Venice Commission expressed its serious concerns about the systematic shielding of ordinary laws from the constitutional review. The restriction (budgetary matters) and in some cases complete removal (constitutionalised matters) of the competence of the Court to review ordinary legislation undermines on the one hand the rule of law – as the constitutional protection of the standards of the FL became limited; on the other hand infringes the democratic system of checks and balances – as the Constitutional Court lost its influence and is not able to provide effective control.³⁸

Before the Fourth Amendment some hope was expressed regarding ‘constitutional continuity’, in that the Constitutional Court seemed to be willing to refer to its jurisprudence and recall the previous argumentation if the formulation of text of the FL is the same as was the wording of the Constitution.³⁹ However, the Fourth Amendment of the FL has repealed

Constitutional Court has declared that the Hungarian Parliament exceeded its legislative authority, when enacted such regulations into the “Transitional Provisions of the Fundamental Law” that did not have transitional character. The Hungarian Parliament shall comply with the procedural requirements also when acting as constitution-maker, because the regulations that violate these requirements are invalid. Therefore the Constitutional Court annulled the concerned regulations due to formal deficiencies. The Constitutional Court, regarding its consistent practice, did not examine the constitutionality of the content of the Fundamental Law and the Transitional Provisions’, available at <<http://www.mkab.hu/sajto/news/certain-parts-of-the-transitional-provisions-of-the-fundamental-law-held-contrary-to-the-fundamental-law>> (accessed 30 November 2016). It is worth to mention the governing party’s response, in which the faction leader immediately declared that the annulled provisions will be inserted into the FL.

³⁷ CC Decision 45/2012. (XII. 29.) AB, para [118]. See the English version of the text: http://hunconcourt.hu/letoltesek/en_0045_2012.pdf. Accessed 31 July 2017.

³⁸ Opinion no. 720/2013 of the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary., point 87.

³⁹ The Constitutional Court has clarified that the formulation of art E paras (2) and (4) of the FL and that of s 2/A paras (1)–(2) of the Constitution has the same meaning and so, during the interpretation of art E, the Court has maintained its previous precedent. Decision 22/2012. (V. 11.) AB of the Constitutional Court of Hungary, ABK June 2012, 94, 97. Reasoning [40]–[41]:

In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. [...] The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid.

the decisions of the Constitutional Court delivered prior to the FL.⁴⁰ It undermines not just the originally developed case law of the Constitutional Court, but also the practice of the courts of law, which, with increasing frequency, referred to Constitutional Court rulings. Although the Constitutional Court refused the substantive examination of the Fourth Amendment, it emphasised the importance of the international and European constitutional achievements,⁴¹ and later clarified that, even after the Fourth Amendment, it is possible to quote the former decisions under certain circumstances.⁴²

We may summarize that the Constitutional Court has lost much of its capacity to be an effective balance to the legislative power. It was having a hard time in the period 2010–2017. The Constitution to be applied has undergone fundamental changes, the composition of the body has changed, the applicable cardinal rules on the Constitutional Court have changed, moreover, the Fundamental Law, which forms the basis, and the legal environment have been constantly altered by the parliamentary majority.⁴³ Consistency problems can be perceived in the relevant rules. The question is, to what extent the new Constitutional Court will be able to set foot on the slippery slope of the current constitutional system, and whether it will be able to pave the way to a judicially developed European constitutionalism, which would also follow from the Hungarian constitutional traditions.

4. THE WEAK CONSTITUTIONAL COURT IN THE CRISIS

4.1 A deferential position

At the same time the economic crisis and especially the rapid exchange rate depreciation of the Hungarian Forint resulted in a significantly worsened situation of debtors since loans were in other foreign currencies, mainly CHF and not denominated in Forint. Tens of thousands of families faced a very tough economic situation, many of them threatened with eviction. Consequences of indebtedness reached all levels of society. Due to the unfavourable changes, numerous civil proceedings were instituted by consumers on different grounds against consumer loan agreements. Questions raised as part of the trials were examined several times by Hungary's Supreme Court, the Curia, before the legislator decided to resolve the situation through legislation. All participants of the crisis waited for the final judgement of the Constitutional Court in order to see the constitutional frameworks

⁴⁰ See Article 19 of the Fourth Amendment.

⁴¹ The obligations of Hungary that arise from the international treaties, the EU membership and the generally recognised rules of international law, and the fundamental principles and values compose such a coherent system that cannot be left out of consideration during the constitution-making process, legislation and constitutional examination of the Constitutional Court. See CC Decision 12/2013. (V. 24.) AB of the Constitutional Court of Hungary, ABK March 2013, 542, 547.

⁴² According to the position of the Constitutional Court, the use of the arguments in the decisions dated before the Fundamental Law shall be reasoned with sufficient detail. Ignoring the principles from the previous decisions is possible even if the content of certain provisions of the previous Constitution and the Fundamental Law is the same. However, the way that domestic and European constitutional development has done so far affects the interpretation of the Fundamental Law. See CC Decision 13/2013. (VI. 17.) AB of the Constitutional Court of Hungary, ABK March 2013, 618, 624.

⁴³ See also Szente (2016).

of the crisis management. However, in the above described constitutional crisis that Constitutional Court could not be up to fulfil its task.⁴⁴

We will firstly list here the relevant decisions in order to demonstrate the volume and nature of the cases, and later in the next subchapter we will arrive at the analyses of some of them in order to show how the Constitutional Court has used the financial crisis argument in this very sensitive situation.

The Hungarian Constitutional Court had dealt with problems related to foreign currency loan crisis for the first time in its decision no. 73/2011. (X. 19.). The Constitutional Court reviewed the constitutionality of the decision of the National Electoral Commission (*Nemzeti Választási Bizottság*) about a popular initiative for referendum. The question read as follows: ‘Do you agree that the Parliament intervene by way of legislation in foreign currency loan agreements and change them so that 50% of the volume of debt and changes of instalments generated due to the fluctuations of Forint should be borne by banks that provided the loans?’ The National Electoral Commission refused to validate the form for collection of signatures⁴⁵ because, according to its opinion, the question failed to comply with the requirements of clarity since, among others, it was not foreseeable what legislative obligation would fall on the Parliament following an effective referendum. The Constitutional Court considered the objection against the decision of the National Electoral Commission to be inadmissible. This decision obviously not required the review of the legislation on foreign exchange loan contracts, however, this was the Constitutional Court’s first decision related to the subject. It is also clearly shown that referenda were aimed at resolving the problem.

The first substantive decision of the Constitutional Court related to consumer loan agreements denominated in foreign currency was the 3048/2013. (II. 28.) Constitutional Court decision. The petitioners attacked primarily the so-called ‘Repayment Act’ (act on fixed-rate early repayment of foreign currency loans, hereinafter referred to as the Repayment Act),⁴⁶ and besides that, they considered some sub-paragraphs of the Act CXII of 1996 on Credit Institutions and Financial Enterprises unconstitutional. The attacked sub-paragraphs allowed, under certain preconditions, the debtor to make a lump-sum payment on an exchange rate, different to those foreseen in the contract, fixed by regulation until 1 April 2012. The Constitutional Court did not consider the aforementioned legal regulations unconstitutional.

In November 2013, for the first time after the adoption of the Fundamental Law of Hungary, the Government requested abstract interpretation of the constitution from the Constitutional Court. The initiative suggested that the unexpected and large-scale changes in the foreign exchange rates and the growth of instalments of foreign currency-denominated loans caused serious challenges to a large pool of society which makes inevitable the final regulation of problems. The government requested the Constitutional Court’s interpretation in two questions: does it follow from Article M) (2)⁴⁷ of the Fundamental Law on consumer protection that foreign currency-denominated loans are against the Fundamental Law of

⁴⁴ Drinóczy (2013) 53–82.

⁴⁵ 25/2011. (III. 9.) National Electoral Commission decision, <<http://valasztas.hu/hu/nvb/hatarozatok/2011/2011-3592.html>> last accessed 31 July 2017.

⁴⁶ Act CXXI of 2011 on the Amendment of Certain Laws Related to Home Protection, <<http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK11110.pdf>> last accessed 31 July 2017.

⁴⁷ Article M) (2) of the Fundamental Law: ‘Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of a dominant position and protect the rights of consumers.’

Hungary; and does the adoption of the Fundamental Law lead to changes with regard to the conditions under which the legislature can modify existing contracts? In its decision no. 8/2014. (III. 20.) interpreting the Fundamental Law, the Constitutional Court enforced its former interpretation of the issue.

Act XXXVIII of 2014 on the Resolution of Questions Relating to the Uniformity Decision of the Curia Regarding Consumer Loan Agreements of Financial Institutions (hereinafter referred to as the Act) was adopted by the National Assembly in order to enforce requirements set out in the uniformity decision no. 2/2014 of the Uniformity Panel of the Curia regarding the foreign currency loan contracts. The Act declared that the exchange rate margins are void and legislated on the presumption of the unfairness of the contract terms allowing for the possibility to alter the terms of the contract unilaterally by the financial institution. It was up to the financial institutions to prove that their contract was in conformity with all the seven requirements set up by the above-mentioned Curia Uniformity Decision for the fairness of the contract. The Act therefore introduced, in a retroactive manner, a presumption of unfairness in case a contractual term was not negotiated individually, which requirement had not existed before the entry into force of the Act, despite the fact that unilateral contract amendments were regulated by a number of rules between 2004 and 2014.

Following this, the Constitutional Court concluded its decision no. 34/2014. (XI. 14.), which examined the Act's unconstitutionality.⁴⁸ The Act regulated basically two questions: that exchange rate margins are null and void (Article 3) and that unilateral amendments to contracts are unfair (Article 4). According to the Constitutional Court, the concerns raised by the petitioners, the acting judges of the Budapest-Capital Regional Court over the constitutionality of the rules did not attain the level of unconstitutionality neither in the details nor as a whole. They did have a restrictive effect on the fundamental rights in question but the restriction itself could not be considered unconstitutional on the grounds of Article I (3) of the Fundamental Law (necessity and proportionality requirement).⁴⁹

Finally, in the decision no. 2/2015. (II. 2.) of the Constitutional Court, the Court rejected some other judicial referrals again. The review was initiated by the judges of the Metropolitan Court of Appeal acting at second instance. The judges referred to the unconstitutionality of Articles 7–15 of the Act, claiming that the principle of separation of powers, the right to fair trial, the rule of law and the legal certainty were breached.

Later, the Constitutional Court concluded a great number of decisions in subject of foreign currency loan crisis legislation.⁵⁰

⁴⁸ Drinóczy (2014) 3–12.

⁴⁹ Article I) (3) of the Fundamental Law: 'The rules relating to fundamental rights and obligations shall be laid down in Acts. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.'

⁵⁰ According to statistics of the Constitutional Court, in 2015, 630 motions were submitted to the Constitutional Court in the same subject and 1,300 constitutional complaints with essentially identical texts were submitted in the same period. 700 foreign currency loan cases were in the Court's docket on 31 December 2015, <http://mkab.hu/letoltesek/ab_ugyforgalom_2015.pdf> last accessed 31 July 2017. Constitutional Court decision 7/2015. (III. 19.) reviewed the unconstitutionality of the Act and certain provisions of the uniformity decision no. 2/2014 of the Uniformity Panel of the Curia, and rejected the claims over incompatibility with the Fundamental Law. Similarly, Constitutional Court decision 3057/2015. (III. 31.), 3121/2015. (VII. 9.), 3143/2015. (VII. 24.).

4.2 Economic Crisis as A Point of Reference in constitutional adjudication in Hungary

The Constitutional Court decisions that are examined in this study analysed regulations that set as goal to resolve a challenging social problem.⁵¹ The Constitutional Court made such doctrinal observations in these decisions, which should be relevant only under these circumstances of financial crisis, however, the effects of these decisions are much more far reaching, because they were born in the above-mentioned times of instability of the constitution. The joint emergence of the case law in crisis management and the general constitutional crisis has led to the result of complete uncertainty of constitutional standards. Constitutional standards became play tools of the majority, because the Constitutional Court was not able to balance in the times of general constitutional and concrete constitutional crises. The financial and the political challenge emerging at the same time was too much for the Court.

Before 2008, in its decision no. 26/1992. (IV. 30.) the Constitutional Court established that the provisions of the Act on the protection of trade union assets and the right of freedom of organization of workers and their equal operation opportunities⁵² were unconstitutional and therefore it annulled them. The decision clearly underlined the exceptional nature of the Constitutional Court decision:

As a special, one-time circumstance of the change of the regime, in this social phenomenon, the trade union assets accumulated were put in a ‘crisis situation’ due to cessations and transformations without being settled legally. In this crisis situation the legislator shall secure the protection, the use, the usability and availability of trade union assets guaranteeing the constitutional freedom of the interest group until the terms of financial situation are not settled. The constitutionality of exceptional and one-off interventions is linked to the utmost importance of trade unions and the accomplished transition of trade unions. This, however, does not mean that the transition of other social organisations and settling the financial situation shall be conducted by subsequent legislation.

The Constitutional Court in its decision no. 43/1995. (VI. 30.) examining the constitutionality of certain provisions of the ‘Bokros package’, which was aimed at preventing insolvency, had changed some points in its previous considerations. However, in this case, it provided a more convincing legal reasoning about why these changes are necessary.⁵³

Following the economic crisis of 2008, the practice of the Constitutional Court underwent through a significant transition. The Constitutional Court decision no. 23/2013. (IX. 25.) about the establishment of unconstitutionality and annulment of the amendments related to old-age pensions,⁵⁴ the Constitutional Court pointed out that ‘the emergency situation of public finance deepened by the economic situation as well as the financial and economic crisis, it was inevitable to set as a long-term governmental goal, the reduction of

⁵¹ On changing constitutional provisions and legislation with regard to the crisis see Szente (2013) 245–62.

⁵² Act XXVIII of 1991, Article 7. section (2) b) and Article 9.

⁵³ See the analyses of the arguments in English: Scheppele ‘(2005). 3–29, 20–22.

⁵⁴ Act CLXVII. of 2011 on retirement benefits Article 14 (1)–(2).

public debt. A number of fair and legitimate demands and efforts had to be subject to this goal'.⁵⁵

The Constitutional Court decision no. 8/2014. (III. 20.) highlighted – in the case of early repayment scheme – that ‘a significant, exceptional and serious situation occurred in Hungary in the middle of an international crisis which led to an intervention by law.’⁵⁶ In parallel, the President of the Constitutional Court Barnabás Lenkovics had given a detailed analysis on the duties of the state generated by the economic crisis. According to this, the legislator shall find a legislation on normative level which is constitutional, legitimate and equitable to the vast majority of the contracts, if not to all of them. Such legislation is legitimate if it meets the requirement of the private law deemed constitutional, therefore it restores equality, coordination and equivalence between the parties, briefly said, it restores the fair balance of interests. Such legislation is equitable if it takes into account with sufficient differentiation and equal diligence the aspects of both parties, including the financial and social situation of debtors, the aim of the contract as well as the advantages and disadvantages the parties that may be or may have been subject to before and after the crisis.⁵⁷

The reference made to the economic crisis appears in Constitutional Court decision no. 34/2014. (XI. 14.) and Constitutional Court decision no. 2/2015. (II. 2.) as well. The reasoning of the previous one suggests that it is commonly known that following the economic crisis of 2008–2009, hundreds of thousands of loan contracts persistently appeared and caused enormous difficulties. A mass of households had to face difficult situations; tens of thousands of families were threatened with eviction. Negative effects of the problem are borne by the society, the whole of the national economy. These problems could have not been resolved by judicial way (as part of individual judicial protection).⁵⁸ It is with regards to the general right to personhood as mother right that the latter Constitutional Court decision refers to ‘the social crisis situation created by the global financial crisis of 2008 and 2009 and the mass of foreign exchange loan contracts.’⁵⁹

It is a question, though, if the economic crisis can serve as point of reference in the review of previously formulated standards.⁶⁰ Nonetheless, the latest practice of the Constitutional Court raises a more pragmatic problem. Referring to the economic crisis without any further explanation makes it hard to understand the findings of the Constitutional Court because in this regard it is unclear if the provisions of the decisions are relevant only in case of the economic crisis or if the Constitutional Court intends to overwrite its previous position for the reason of the economic situation.

Barnabás Lenkovics, then president of the Constitutional Court attached a dissenting opinion to Constitutional Court decision no. 45/2012. (XII. 29.) on the unconstitutionality and annulment of certain provisions of the TP-FL, which shed light to the position of the Court. In his reasoning, Judge Lenkovics had given a detailed overview on the extensive,

⁵⁵ Hungarian Constitutional Court, Decision 23/2013. (IX. 25.) AB, Reasoning [47].

⁵⁶ Hungarian Constitutional Court, Decision 8/2014. (III. 20.) AB, Reasoning [95].

⁵⁷ Reference to the financial crises is present in one of the dissenting opinions (judge Dienes-Ohm Egon) of the Hungarian Constitutional Court, Decision 7/2014. (III. 7.) AB, <<http://public.mkab.hu/dev/dontesek.nsf/0/DCAE82809F3037D2C1257BBF001BABA1?OpenDocument>> last accessed 31 July 2017, Reasoning [86].

⁵⁸ Hungarian Constitutional Court, Decision 34/2014. (XI. 14.) AB, Reasoning [44].

⁵⁹ Hungarian Constitutional Court, Decision 2/2015. (II. 2.) AB, Reasoning [64].

⁶⁰ On ‘flexible constitution’ see e.g. Black (2010) 36–40.

deep political, economic, financial, social and moral crisis that hit the country, and explained how these circumstances affected the fundamental rights. Judge Lenkovics cited Szladits, one of the most influential civilian law scholars of Hungary of the 20th century, saying that for the sake of democratic governability, the use of legislative solutions can be justified.⁶¹

It is well beyond doubt possible that in exceptional situations different solutions will be required temporarily. The practice of the Constitutional Court in these recent years, however, created the danger that the successive application and adoption of exceptional measures which are devoid of general use the Constitutional Court will contribute to reduce the stability of the constitutional order by accepting the constitutionality of measures that would have been declared unconstitutional in other circumstances.

5. CONCLUSION

In the Hungarian legal literature, some analyses have already been undertaken about how the ‘crisis situation’ as a reference point appeared in the Hungarian constitutional adjudication since the 1990s and after 2008.⁶² The present paper maintains that the judicial practice of the Hungarian Constitutional Court is inconsistent with regard to the role of financial crisis in constitutional doctrine. The paper argues that this change in doctrine was caused not only by the financial crisis, but rather by the general constitutional crisis emerging at the same time. Since the entering into force of the Fundamental Law in 2012 the Constitutional Court has had to operate under extraordinary circumstances, and this has not strengthened its intention to strike a better balance against the joint government-parliamentary majority but it rather showed deference.

The long-term effects of the analysed decisions are unforeseeable. Some standards are in transition while new standards are appearing but so far no coherent framework can be observed in the jurisprudence of the Court. The experience of the decisions on foreign currency loan cases shows that the ‘crisis situation’ and the approach of the majority of the Constitutional Court was enough to make some standards that were believed to be normative fade by referring to the text of the Fundamental Law. Such normative measures were, among others, the principle of separation of powers, the judicial independence, non-retroactivity of law and the right to fair trials. The level of protection of the aforesaid principles and rights has significantly changed. Some rights, such as the right to human dignity and some duties of the state such as consumer protection gained new constitutional position and a novel meaning.⁶³

Only one question remains: will it always be like this in the future, or are these just constitutional concepts emerging to the extraordinary situations of the two parallel – financial and constitutional – crises? The decisions and their circumstances examined above prove that it is rather the international and EU law that remains as effective balance of the parliamentary majority, because within the described circumstances the Constitutional Court was not able to protect the rule of law against political pressure.

⁶¹ Hungarian Constitutional Court, Decision 45/2012. (XII. 29.) AB, <<http://public.mkab.hu/dev/dontesek.nsf/0/B139EF59DD213D0BC1257ADA00524EC0?OpenDocument>>, last accessed 31 July 2017, dissenting opinion point 4. and 7.

⁶² Chronowski and Vincze (2014) 104–12., Tóth and Kovács (2013) 317–42.

⁶³ See a detailed analysis of changing standards in these cases in Fruzsina Gárdos-Orosz, ‘Constitutional review in credit crises – Hungarian constitutional justice in change’ *Sudosteuropa*, 2017 forthcoming.

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